No. 99-836

IN THE

Supreme Court of the United States

OCTOBER TERM, 1999

THOMAS A. BARFIELD,

Petitioner,

v.

ORMET PRIMARY ALUMINUM CORPORATION,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF IN OPPOSITION

WILLIAM R. D'ARMOND
KEAN, MILLER, HAWTHORNE, D'ARMOND, MCCOWAN & JARMAN, L.L.P.
P.O. Box 3513
Baton Rouge, LA 70821
(225) 387-0999

CHRISTOPHER LANDAU
Counsel of Record
KIRKLAND & ELLIS
655 Fifteenth Street, N.W.
Washington, D.C. 20005
(202) 879-5000

January 7, 2000

TABLE OF CONTENTS

Page

RULE 29.6 STATEMENT ii

TABLE OF AUTHORITIES iii

COUNTERSTATEMENT OF THE CASE 2

REASONS FOR DENYING THE WRIT 5

THE LOWER COURTS CORRECTLY APPLIED SETTLED LAW. 5

A. This Case Does Not Raise The Issue Presented in *Reeves.* 5

B. The Lower Courts Correctly Held Than Barfield Could Not Defeat Summary Judgment Based on "Stray Remarks." 7

C. The Lower Courts Correctly Held Than Barfield Could Not Defeat Summary Judgment Based on Generalized Statistical Evidence. 8

CONCLUSION 9

RULE 29.6 STATEMENT

Pursuant to Rule 29.6, respondent Ormet Primary Aluminum Corporation states that it is a subsidiary of Ormet Corporation, a privately held company, and that no publicly held company owns more than 10% of its stock.

TABLE OF AUTHORITIES

Cases: **Page**

Alston v. GTE Directories Corp.,
120 S. Ct. 532 (Nov. 29, 1999) (No. 99-580) 7

Anderson v. Baxter Healthcare Corp.,
13 F.3d 1120 (7th Cir. 1994) 6

Ayala-Gerena v. Bristol Myers-Squibb Co.,
95 F.3d 86 (1st Cir. 1996) 8

Brinkley v. Harbour Recreation Club,
180 F.3d 598 (4th Cir. 1999) 8

Bullington v. United Air Lines, Inc.,
186 F.3d 1301 (10th Cir. 1999) 9

Combs v. Plantation Patterns,
106 F.3d 1519 (11th Cir. 1997) 6

Cone v. Longmont United Hosp. Ass'n,
14 F.3d 526 (10th Cir. 1994) 8

Cullen v. Olin Corp.,
195 F.3d 317 (7th Cir. 1999) 8

Fisher v. Vassar College,
114 F.3d 1332 (2d Cir. 1997) 6, 7

Furr v. Seagate Tech., Inc.,
82 F.3d 980 (10th Cir. 1996) 9

Gillins v. Berkeley Elec. Coop., Inc.,
148 F.3d 413 (4th Cir. 1998) 6

Hidalgo v. Overseas Condado Ins. Agencies, Inc.,
120 F.3d 328 (1st Cir. 1997) 6

Jackson v. E.J. Brach Corp.,
176 F.3d 971 (7th Cir. 1999) 6

Kline v. TVA,
128 F.3d 337 (6th Cir. 1997) 6

LeBlanc v. Great Am. Ins. Co.,
6 F.3d 836 (1st Cir. 1993) 9

McDonnell Douglas Corp. v. Green,
411 U.S. 792 (1973) 3

Merrick v. Farmers Ins. Group,
892 F.2d 1434 (9th Cir. 1990) 8

Mitchell v. USBI Co.,
186 F.3d 1352 (11th Cir. 1999) 6

Nidds v. Schindler Elevator Corp.,
113 F.3d 912 (9th Cir. 1997) 6

Pamintuan v. Nanticoke Mem. Hosp.,
192 F.3d 378 (3d Cir. 1999) 6

Pivirotto v. Innovative Sys., Inc.,
191 F.3d 344 (3d Cir. 1999) 8

Price Waterhouse v. Hopkins,
490 U.S. 228 (1989) 8

Randle v. City of Aurora,
69 F.3d 441 (10th Cir. 1995) 6

Reeves v. Sanderson Plumbing Prods., Inc.,
180 F.3d 263 (5th Cir.),
cert. granted, 120 S. Ct. 444 (1999) (No. 99-536) 1

Rodriguez v. Muhlenberg Hosp. Ctr.,
120 S. Ct. 528 (Nov. 29, 1999) (No. 99-488) 7

Ryther v. KARE 11,
108 F.3d 832 (8th Cir. 1997) 6

Sessions v. Rusk State Hosp.,
648 F.2d 1066 (5th Cir. Unit A 1981) 9

Sheridan v. E.I. DuPont de Nemours & Co.,
100 F.3d 1061 (3d Cir. 1996) 6

Shorter v. ICG Holdings, Inc.,
188 F.3d 1204 (10th Cir. 1999) 6

Simmons v. Oce-USA, Inc.,
174 F.3d 913 (8th Cir. 1999) 8

Smith v. Berry Co.,
165 F.3d 390 (5th Cir. 1999) 8

Stanley v. University of So. Calif.,
120 S. Ct. 533 (Nov. 29, 1999) (No. 99-654) 7

Walton v. Bisco Indus., Inc.,
119 F.3d 368 (5th Cir. 1997) 6

Warfield v. Lebanon Correctional Inst.,
181 F.3d 723 (6th Cir. 1999) 6

Warren v. City of Carlsbad,
58 F.3d 439 (9th Cir. 1995) 6

Watkins v. Sverdrup Tech., Inc.,
153 F.3d 1308 (11th Cir. 1998) 9

Statutes: **Page**

29 U.S.C. § 1001 *et seq.* 2

29 U.S.C. § 621 *et seq* 2

La. Rev. Stat. § 51:2231 *et seq.* 3

IN THE

Supreme Court of the United States

OCTOBER TERM, 1999

THOMAS A. BARFIELD,

Petitioner,

v.

ORMET PRIMARY ALUMINUM CORPORATION,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

BRIEF IN OPPOSITION

Petitioner asserts that this case raises "the same issue" presented in *Reeves v. Sanderson Plumbing Prods., Inc.*, 180 F.3d 263 (5th Cir.), *cert. granted*, 120 S. Ct. 444 (1999) (No. 99-536), and requests "that [t]his case be accepted as a companion to the *Reeves* case or, alternatively, that it be held pending resolution of that matter." Pet. 4. But that assertion is incorrect, and the request is thus misplaced. This case does not raise the issue presented in *Reeves*, or any other issue warranting this Court's review.

This case raises only the fact-specific issue whether petitioner presented sufficient evidence to create a genuine issue of material fact as to whether respondent's reason for discharging him was pretextual. Both the district court and the Fifth Circuit concluded that petitioner had failed to carry his burden of proof on that issue. The question in *Reeves*, in contrast, is whether a plaintiff needs to show anything *in addition to* pretext in order to avoid summary judgment in an

employment discrimination case. That question is simply not implicated where, as here, the plaintiff fails to raise a jury question on the issue of pretext in the first instance. Try as he might, petitioner cannot squeeze this case into the *Reeves* slipper. Accordingly, the petition should be denied.

COUNTERSTATEMENT OF THE CASE

This is a straightforward employment dispute. Barfield worked for Ormet for thirty-four years, and attained the position of general supervisor of the instrument, electrical, and general maintenance sections of Ormet's alumina plant and marine terminal in Burnside, Louisiana. Pet. App. 4-5. Five supervisors worked directly under Barfield. *Id.* at 5.

Barfield's ultimate supervisor at the Burnside facilities was general manager Quentin Bell. *Id.* at 4. In April 1996, Bell implemented a new work schedule for instrument repairmen. *Id.* at 5. On April 26, 1996, four repairmen failed to report for work as an apparent protest against the new schedule. *Id.* Bell called a meeting with Barfield and two other supervisors to discuss the situation. *Id.* at 5-6. During the meeting, Bell became angry with Barfield, and ordered him out of the room. *Id.* at 6 & n.1.

On April 30, Bell completed a memorandum recommending that Barfield be discharged, and, in accordance with company procedures, discussed that decision with a personnel official. *Id.* at 6. On May 6, 1996, Bell met with Barfield and discharged him for insubordination. *Id.* At that time, Barfield was 61 years old. *Id.* Several months later, he was replaced by another employee who was 43 years old. *Id.*

Barfield filed this lawsuit against Ormet in March 1997, alleging that his discharge violated the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. § 621 *et seq.*[1]

---

[1] The complaint also alleged that Barfield's discharge violated the Employee Retirement Income Security Act, 29 U.S.C. § 1001 *et seq.*, and (continued...)

The district court (Parker, C.J., M.D. La.) granted Ormet's motion for summary judgment. As the district court explained, the analytical framework governing employment discrimination claims is well-established: "(1) plaintiff must demonstrate a prima facie case of discrimination; (2) the burden of production shifts to the employer to articulate a legitimate and nondiscriminatory basis for the adverse employment decision; and (3) plaintiff must then prove by a preponderance of the evidence that the employer's proffered reason is pretext." *Id.* at 11-12 & n.7 (citing, *inter alia, McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-04 (1973)).

Applying this framework, the district court first concluded that Barfield had met his *prima facie* burden by showing that (1) he was discharged; (2) he was qualified for his position; (3) he was within the protected class; and (4) he was replaced by someone younger. Pet. App. 12.

The court, however, then concluded that Ormet had articulated a nondiscriminatory reason for Barfield's discharge —insubordination—and that Barfield had failed to raise a genuine issue of material fact as to whether this reason was a pretext for age discrimination. *Id.* at 12-16. The court carefully reviewed the evidence "in the light most favorable to plaintiff," *id.* at 12, and noted that Barfield did not dispute that there had been a disagreement at the April 26 meeting, or that Bell had become angry with Barfield and had ordered him to leave the room, *id.* at 15. Regardless of whether Bell had "misinterpreted the responses given by Barfield" at that meeting, the district court held, "this does not amount to a pretext for discrimination." *Id.* at 15-16.

---

[1] (...continued)
the Louisiana Commission on Human Rights Act, La. Rev. Stat. § 51:2231 *et seq.* The lower courts rejected both those claims, and Barfield has now abandoned them in this Court.

That conclusion was not altered, the court explained, by the testimony of another former Ormet employee who alleged that at a Christmas party in 1994—over a year before Barfield's discharge—Bell had stated that Barfield was "getting paid way more than [he was] doing," that Bell "could put two or three people to work for that price," and that the plant could not progress because "[the older workers] were too set in [their] ways." *Id.* at 16 (brackets in original). These remarks, the court explained, were "merely an expression by Bell of his commitment as general manager to progress and efficiency." *Id.* at 17. As such, they were nothing more than "stray remarks" that did not demonstrate age bias in connection with Barfield's discharge.

Finally, the district court rejected Barfield's reliance on a statistical study purporting to show that Ormet was "engaged in age discrimination by weeding out older management employees." *Id.* (internal quotation omitted). The court noted that the study failed to take into account the individual circumstances of discharged employees, and that Bell had made only two of the discharge decisions in the study. *Id.* Such "generalized statistical evidence," the court held, "fails to rebut the particularized, nondiscriminatory rationale behind plaintiff's discharge in this case." *Id.* at 18.

For all of these reasons, the district court specifically concluded that "[p]laintiff has failed to establish that insubordination was a pretext used by defendant for age discrimination." *Id.* That conclusion, in turn, meant that "[p]laintiff has failed to produce sufficient evidence of age discrimination creating a genuine issue of fact for trial," *id.*, and that Ormet was entitled to summary judgment.

The Fifth Circuit, in an unpublished *per curiam* opinion, affirmed "essentially for the reasons given by the trial court." Pet. App. 2. The court of appeals specifically rejected Barfield's argument "that the non-discriminatory reason for termination offered by the employer is a pretext for age discrimination." *Id.* at 1-2. Like the district court, the Fifth

Circuit held that "even if, as Appellant contends, his remarks at the meeting concerning the scheduling were misinterpreted by Bell, and that he did not refuse to answer the questions put to him, he has still not raised a material issue that the real reason for his termination was age discrimination." *Id.* at 2. The Fifth Circuit further held that the district court had "properly disregarded" Barfield's statistical evidence, and that "the earlier remarks attributed to Bell were far too distant in time and remote in circumstances to create the material fact issue needed." *Id.*

REASONS FOR DENYING THE WRIT

THE LOWER COURTS CORRECTLY APPLIED SETTLED LAW.

A. This Case Does Not Raise The Issue Presented in *Reeves*.

Barfield's principal argument is that this case raises "the same issue" presented in the pending *Reeves* case, and thus should be consolidated with or held for that case. Pet. 4. That argument is incorrect.

The lower courts in this case specifically held that Ormet was entitled to summary judgment because Barfield had failed to create a genuine issue of material fact on the issue of pretext. *See* Pet. App. 2 (Fifth Circuit); *id.* at 15-16, 18 (district court). It is thus nothing but wishful thinking for Barfield now to assert that he "established a triable issue on pretext" below. Pet. 6; *see also id.* (asserting that "[h]ere the plaintiff showed" that the nondiscriminatory reason articulated by Ormet "was not true"). This case turns on the issue of pretext, and Barfield squarely lost on that issue below.

It necessarily follows that this case does not raise "[t]he raging issue in employment discrimination law," Pet. 5, now before this Court in *Reeves*: whether a plaintiff can avoid summary judgment *solely* by creating a genuine issue of material fact on pretext, or whether he must *also* create a genuine issue of material fact on the ultimate issue of

discrimination.[2] As a matter of law and logic, that issue is not implicated where, as here, the plaintiff fails to create a genuine issue of material fact on pretext in the first instance. Under those circumstances, the employer is entitled to summary judgment in *every* circuit.[3] Resolution of the circuit split at issue in *Reeves*, in short, would in no way affect the result in

---

[2] The Fifth Circuit in *Reeves* specifically held that the employee in that case "very well may be correct" that the employer's reason was pretextual, but that summary judgment was nonetheless warranted because the employee failed to satisfy the additional requirement of presenting sufficient evidence that the disputed employment action was motivated by discrimination. Pet. for Cert. at 8a, *Reeves v. Sanderson Plumbing Prods., Inc.*, *cert. granted*, 120 S. Ct. 444 (1999) (No. 99-536). Thus, in sharp contrast to this case, *Reeves* squarely presents the acknowledged circuit split on the existence of such an additional requirement. *Compare, e.g., Kline v. TVA*, 128 F.3d 337, 342-47 (6th Cir. 1997) (employee can defeat summary judgment solely by creating genuine issue of material fact on pretext); *Combs v. Plantation Patterns*, 106 F.3d 1519, 1529-38 (11th Cir. 1997) (same); *Sheridan v. E.I. DuPont de Nemours & Co.*, 100 F.3d 1061, 1066-67 (3d Cir. 1996) (*en banc*) (same); *Randle v. City of Aurora*, 69 F.3d 441, 451 (10th Cir. 1995) (same); *Warren v. City of Carlsbad*, 58 F.3d 439, 443 (9th Cir. 1995) (same); *Anderson v. Baxter Healthcare Corp.*, 13 F.3d 1120, 1123 (7th Cir. 1994) (same), *with Gillins v. Berkeley Elec. Coop., Inc.*, 148 F.3d 413, 416 (4th Cir. 1998) (employee can defeat summary judgment only by creating genuine issue of material fact on pretext *and* showing that employer's real reason was discriminatory); *Hidalgo v. Overseas Condado Ins. Agencies, Inc.*, 120 F.3d 328, 335-37 (1st Cir. 1997) (same); *Walton v. Bisco Indus., Inc.*, 119 F.3d 368, 370 (5th Cir. 1997) (same); *Fisher v. Vassar College*, 114 F.3d 1332, 1339 (2d Cir. 1997) (*en banc*) (same); *Ryther v. KARE 11*, 108 F.3d 832, 836-37 (8th Cir. 1997) (*en banc*) (same).

[3] In particular, those circuits that have adopted the rule advanced by the employee in *Reeves* routinely uphold summary judgment in the employer's favor where, as here, the employee fails to create a genuine issue of material fact on pretext. *See, e.g., Pamintuan v. Nanticoke Mem. Hosp.*, 192 F.3d 378, 386-87 (3d Cir. 1999); *Shorter v. ICG Holdings, Inc.*, 188 F.3d 1204, 1209-10 (10th Cir. 1999); *Mitchell v. USBI Co.*, 186 F.3d 1352, 1354-56 (11th Cir. 1999); *Warfield v. Lebanon Correctional Inst.*, 181 F.3d 723, 730-31 (6th Cir. 1999); *Jackson v. E.J. Brach Corp.*, 176 F.3d 971, 983-86 (7th Cir. 1999); *Nidds v. Schindler Elevator Corp.*, 113 F.3d 912, 918-19 & n.2 (9th Cir. 1997).

this case. Accordingly, there is no reason to hold this case for *Reeves*.

Indeed, if this Court were to hold for *Reeves* every case in which an employee failed to establish a genuine issue of material fact on pretext, it would create an enormous and unwarranted backlog in the federal judicial system. Because an employee's threshold burden of establishing a *prima facie* case is "minimal," *Fisher v. Vassar College*, 114 F.3d 1332, 1340 n.7 (2d Cir. 1997) (collecting cases), many employment discrimination cases turn on the fact-intensive question whether the employer's reason for a discharge was pretextual. Where, as here, the employee fails to create a genuine issue of material fact on that issue, he cannot prevail as a matter of law. It simply makes no sense to hold all such cases pending resolution of *Reeves*, which presents the legal issue whether a showing of pretext is not only *necessary* but invariably *sufficient* to get to a jury.[4]

B. The Lower Courts Correctly Held Than Barfield Could Not Defeat Summary Judgment Based on "Stray Remarks."

Barfield next argues that the lower courts erred by holding that he could not avoid summary judgment by relying on "ageist" comments allegedly made by his supervisor at a Christmas party some 16 months before Barfield's discharge. Both the district court and the Fifth Circuit carefully reviewed the record, and concluded that the challenged comments were nothing more than "stray remarks" that did not create a genuine

---

[4] Indeed, since granting *certiorari* in *Reeves* on November 8, 1999, this Court has denied *certiorari* in at least three other cases challenging judgment as a matter of law in favor of employers where employees had failed to create a genuine issue of material fact on pretext. *See, e.g., Rodriguez v. Muhlenberg Hosp. Ctr.*, 120 S. Ct. 528 (Nov. 29, 1999) (No. 99-488); *Alston v. GTE Directories Corp.*, 120 S. Ct. 532 (Nov. 29, 1999) (No. 99-580); *Stanley v. University of So. Calif.*, 120 S. Ct. 533 (Nov. 29, 1999) (No. 99-654).

issue of material fact on the dispositive issue of pretext. *See* Pet. App. 2 (Fifth Circuit); *id.* at 16-17 (district court).

Barfield challenges that conclusion, asserting that the comments at issue "reflected a stereotyped conception that older workers could not be innovative or have modern ideas." Pet. 7. But that assertion fails to establish the necessary link between those alleged comments and his discharge. As the Fifth Circuit explained, the disputed comments "were far too distant in time and remote in circumstances to create the material fact issue needed." Pet. App. 2.

Barfield does not dispute the legal principle that an employee cannot avoid summary judgment by relying on "stray remarks" by the decisionmaker. Nor could he, as this Court and the courts of appeals have uniformly endorsed that principle.[5] Rather, he simply contends that the particular comments at issue were "discriminatory statements" rather than "stray remarks." Pet. 8. But that is nothing more than a challenge to the application of settled law to fact, and does not remotely present a legal issue worthy of this Court's review.

C. The Lower Courts Correctly Held Than Barfield Could Not Defeat Summary Judgment Based on Generalized Statistical Evidence.

Barfield finally argues that the lower courts erred by holding that he could not avoid summary judgment by relying on a statistical study purporting to show "that the pattern of hiring, promotion and firing during Mr. Bell's three and one-half year

---

[5] *See, e.g., Price Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1989) (plurality); *id.* at 277 (O'Connor, J., concurring in the judgment); *id.* at 280 (Kennedy, J., dissenting); *Cullen v. Olin Corp.*, 195 F.3d 317, 323 (7th Cir. 1999); *Pivirotto v. Innovative Sys., Inc.*, 191 F.3d 344, 359 (3d Cir. 1999); *Brinkley v. Harbour Recreation Club*, 180 F.3d 598, 608 (4th Cir. 1999); *Simmons v. Oce-USA, Inc.*, 174 F.3d 913, 915-16 (8th Cir. 1999); *Smith v. Berry Co.*, 165 F.3d 390, 396 (5th Cir. 1999); *Ayala-Gerena v. Bristol Myers-Squibb Co.*, 95 F.3d 86, 96 (1st Cir. 1996); *Cone v. Longmont United Hosp. Ass'n*, 14 F.3d 526, 530-31 (10th Cir. 1994); *Merrick v. Farmers Ins. Group*, 892 F.2d 1434, 1438-39 (9th Cir. 1990).

tenure at the Louisiana plant reflected a statistically significant bias against older workers." Pet. 4. Both the district court and the Fifth Circuit concluded that such "generalized statistical evidence" failed to create a genuine issue of material fact on the dispositive issue of pretext. *See* Pet. App. 2 (Fifth Circuit); *id.* at 18 (district court).

Barfield challenges that conclusion, asserting that "[s]tatistical evidence has been considered relevant from the inception of employment discrimination law." Pet. 9. But the lower courts here did not hold that statistical evidence was *per se* inadmissible, but only that Barfield's particular statistical evidence failed to create a genuine issue of material fact as to whether Ormet's particular reason for discharging him was pretextual. Rather than defending his statistical evidence on the merits, Barfield simply accuses the district court of "an indiscriminate, inappropriate hostility towards the use of statistics." *Id.* That accusation is wholly unwarranted.

While statistical evidence may help buttress a *prima facie* case of employment discrimination, it is of limited utility in rebutting an employer's reason for a particular employment action. *See, e.g., Bullington v. United Air Lines, Inc.*, 186 F.3d 1301, 1319 (10th Cir. 1999); *Watkins v. Sverdrup Tech., Inc.*, 153 F.3d 1308, 1314-16 & n.15 (11th Cir. 1998); *LeBlanc v. Great Am. Ins. Co.*, 6 F.3d 836, 847-49 (1st Cir. 1993); *Sessions v. Rusk State Hosp.*, 648 F.2d 1066, 1071 (5th Cir. Unit A 1981) (Rubin, J.). In particular, "[s]tatistical evidence which fails to properly take into account nondiscriminatory explanations does not permit an inference of pretext." *Furr v. Seagate Tech., Inc.*, 82 F.3d 980, 987 (10th Cir. 1996). The lower courts here simply followed these settled principles. Barfield's insistence that his statistical evidence was sufficient to defeat summary judgment is thus nothing more than a challenge to the application of settled law to fact.

CONCLUSION

For the foregoing reasons, the petition for a writ of *certiorari* should be denied.

Respectfully submitted,

WILLIAM R. D'ARMOND
KEAN, MILLER,
HAWTHORNE, D'ARMOND,
MCCOWAN & JARMAN,
L.L.P.
P.O. Box 3513
Baton Rouge, LA 70821
(225) 387-0999

CHRISTOPHER LANDAU
Counsel of Record
KIRKLAND & ELLIS
655 Fifteenth Street, N.W.
Washington, D.C. 20005
(202) 879-5000

January 7, 2000